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No. 344

In the
Supreme Court of the United States

OCTOBER TERM, 1967

CHARLES ORAN MENSIK and MARY MENSIK,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners C. Oran Mensik and Mary Mensik, respectively and individually, petition for rehearing of this Honorable Court's Order of October 23, 1967 denying petition for Writ of Certiorari in this cause and respectfully state:

The extraordinary circumstances and facts of this case present both newly discovered evidence and other substantial grounds not previously presented, together with a compounding of procedural errors by the Commissioner

of Internal Revenue and government counsel together with the Tax Court's compounded errors—in, first, refusing arbitrarily and capriciously to accord judicial consideration to taxpayers' October 26, 1964 timely Rule 19(e) motion for special leave, and, secondly, in resorting arbitrarily to the "erroneous" procedural Order of March 21, 1966, to avoid the lawfully warranted further consideration of the altogether erroneous Tax Court decision of February 21, 1963 which such Court's pre-finality jurisdiction empowers—constitute such a grievous abuse of judicial discretion with respect to the merits of this cause as to justify affirmative direction by this Court that the Tax Court not only grant taxpayer's Rule 19(e) motion for special leave but, further, grant full hearing, as well, on taxpayer's proposed motion for retrial, further trial and/or reconsideration with full right to introduce newly discovered evidence which—in the interests of justice—will unwork what can only properly be viewed as a wrongful and grievous government taking of taxpayer's property without Due Process of Law.

The Petitioners' position is that of any taxpayer seeking the protection of this Court from arbitrary or even innocent mistake in the action of the Commissioner of Internal Revenue in a wrongful assessment and subsequent collection or taking of property in violation of Due Process of Law. These taxpayers simply did not receive the money now found by the Tax Court to be "income". The newly discovered evidence fully documents and supports this position. This evidence was not entirely available at time of trial. It has been offered to the courts below but refused by them on grounds that taxpayers' petition for rehearing was filed with the Tax Court out of time. It is the position of Petitioners that such motion, contrary to Respondent's position, did specifically

request *special leave* pursuant to Rule 19(e) of the Tax Court and was filed timely (see Record Appendix pp. 16-24) in that the Tax Court could entertain such a motion because the litigation of this cause had not yet become *final* at the time such motion and petition was made.

This case originated by way of jeopardy assessment in the amount of $821,951.33. Taxpayers were advised of this by way of the Chicago Daily News which ran a screaming front page double headline "CHARGE MENSIK OWES $860,699 IN TAXES". This was in June of 1958 and the newspapers unsuccessfully attempted to find an alliance between City Savings Association, of which C. Oran Mensik, the male Petitioner here, was president, and Orville E. Hodge who was Auditor for the State of Illinois and involved a multi-million dollar scandal in connection with alleged embezzlement of State of Illinois funds. Taxpayers received a deficiency notice wherein the exact amount of "income" claimed as subject to assessment amounted to $618,052.42.

It is to be noted that by stipulation, when the case came on for trial in the Tax Court, the Commissioner admitted that there was error in the deficiency notice. This error was neither small nor simple. In fact it was a series of unexplained hasty and arbitrary errors amounting to $385,190.77 all of which the Commissioner, over a period of some 13 months, had to admit were wrong and so stipulated. There was no such formal stipulation as to the *specific item* of $176,312.50 still in issue here before this Court. The original jeopardy assessment of $821,951.33 was admittedly wrong by several hundreds of thousand dollars and it is the position of these taxpayers that they did not receive any of the $176,312.50 here remaining at issue and further that there is evidence and documents which conclusively show they did not receive this money

nor any economic benefit therefrom. Further the taxpayers now can bring in witnesses and documents to show where this money went, including the principal who borrowed and actually received the money, Orville E. Hodge, who was in prison at the time of the trial of this cause and was not present as a witness. It is vital that this Honorable Court consider here that the Respondent seeks to recover not only an arbitrary tax of some $88,000.00 on the $176,312.50, which these taxpayers *can now* demonstrate they did *not* receive, but also penalties and interest which double in compounding amounts that more than destroy the economic security and financial capability of this taxpayer and his family. Such a crushing assessment, based as it is on an incomplete record, requires reconsideration in the interest of justice and an exercise of this Court's powers of supervision over what Petitioners can now show has not been an orderly and just procedure. The 14th Amendment to the Constitution requires every action of the Commissioner to be in conformance with Due Process of Law.

On the eve of trial government counsel filed an amended Answer in this case in the amount of $206,330.56 allegedly received by Melvin Building Corporation. This presented confusion by reason of the fact that it related to an entirely unconnected and never assessed, unrelated contract by City Savings and Melvin Building Corporation for a remodeling job transaction which extended over a period of two years. It is to be noted that this case involves only taxpayers' calendar year 1956. The direct question joined by the pleadings related to the specific $176,312.50 which the Court expressly found to constitute the amount of the three Melvin checks and the three identical corresponding Hodge personal judgment notes executed in connection with the Melvin-Hodge loan. How-

ever, instead of presenting the direct question of the $176,312.50 loan on the direct issue of "bona fides", the trial court in his findings took a most startling and unusual position and stated:

> "The Court dealt with the issue in that posture and the Court said very plainly that on the record in this case and on the evidence the answer would be the same whether or not Hodge received the money as a bona fide loan or whether he didn't receive it."

Such a patently erroneous misstatement of federal income tax principles can only invite the working of grievous injustice upon any taxpayer thus affected. It is axiomatic that any assessment of income tax on proceeds of a bona fide loan is not valid because such a loan does not give rise to taxable income. It makes all the difference in the world whether . . . "Hodge received the money as a bona fide loan or whether he didn't receive it". These taxpayers seek the right to present newly discovered evidence that will show Hodge did receive such a loan and that they did not receive one penny!

THE NEW EVIDENCE

The newly discovered evidence—taking the form of affidavits, copies of officials documents, corporate data, bank statements and other records—was submitted to the Tax Court in support of Petitioners' timely filed Rule 19(e) motion for special leave. Petitioners contend that the refusal of the Tax Court to even accept such filing or consider such evidence was an abuse of discretion violative of Due Process of Law. Such motion for special leave was directed to assisting the Tax Court in resolving the extraordinary circumstances which beclouded the "truth" as to determination of Petitioners-Appellants' proper income tax liability consequences with respect to the specifi-

cally assessed $176,312.50 Melvin-Hodge loan constituting "item (b)(6)" of the Commissioner's July 11, 1958 deficiency notice. These affidavits, singly and collectively, show conclusively that: (1) "item (b)(6)" of the deficiency notice related solely to the 1956 Melvin-Hodge $176,312.50 loan which was not directly contested as to "bona fides" as between the principals Orville E. Hodge and Melvin; (2) the Commissioner, subsequent to the Tax Court's February 21, 1963, decision herein, issued to Orville E. Hodge his June 14, 1963, 90 day letter—viz., deficiency notice—assessing the identical $176,312.50 as constituting 1956 "additional income" taxable to Orville E. Hodge, duplicating the precise specific item here in issue and seeking to tax Hodge! (3) Melvin—as can now be conclusively demonstrated by a detailed financial analysis of the corporation's loan policy in effect during the 1956 taxable year, includes a dollar-for-dollar deposit and withdrawal analysis of the $176,312.50 Melvin-Hodge business loan transaction documenting the direct flow of these funds to Hodge, not these taxpayers, and the use of these funds by *Hodge* himself.

It is uncontested that Melvin Building Corporation reported, for tax purposes, the full receipt of the total $367,500.00 for the City Savings remodeling job. The new evidence will trace the Hodge loan from its transactional beginning through its conclusion and clearly show that Hodge received all the proceeds and Mr. and Mrs. Mensik did not receive one penny of the $176,312.50 and further that no so-called "favors" or economic benefits occurred by reason of this transaction.

We have here a deficiency notice in a *specific items* case that specifically includes a specifically assessed transactional item that—by stipulation of the parties is precisely identified as amounting to exactly $176,312.50—a figure

in odd amount—and this specifically assessed deficiency notice item is precisely identified at the trial—and included in the Tax Court's findings—as constituting a 1956 Melvin Building Corporation-Orville E. Hodge loan. The new evidence goes to the heart of this direct question and will demonstrate not only the bona fides of this loan but further it will fill the void in this record and show that these taxpayers were not in receipt of one cent of this money nor did they receive any so-called "favors" or "economic benefit" that could possibly represent such $176,312.50.

THE RECORD DOES NOT SHOW THAT THESE TAXPAYERS RECEIVED ANY INCOME OR FAVORS FROM THE HODGE-MELVIN LOAN

Due Process, being affirmatively and specifically stated as a just and legal requirement in the 14th Amendment of the Constitution, is an absolute constitutional guarantee to these citizen taxpayers and since the posture of this case has now reached the final stage and last resort, the taxpayers request the granting of this Petition to present the extraordinary circumstances, which if known—at time of trial—the Tax Court would not have rendered the decision it did, and will enable taxpayers to present evidence of conduct by Respondent, before decision but after this case was taken under submission by the Tax Court, then unknown to Petitioners, and actions taken by Respondent after decision of the Tax Court, which action is entirely inconsistent with the Respondent's conduct during trial and contrary to the theory of proof offered by Respondent in its presentation of evidence to the Tax Court in this cause.

Petitioners further state that all courts below have refused to allow the presentation of the newly discovered evidence or to allow testimony that goes to the heart of the trial judge's complaint expressed in the Tax Court

decision in language so astounding as to be a judicial cry for the relevant facts here sought to be entered into this record. The Tax Court in its decision says: • • •

> "Frankly considering the state of the record, we do not know what the truth is . . ."

The trial court can never know the full truth when:

1. The *record* is void of direct testimony or documents showing that these taxpayers received any of the proceeds from the $176,312.50 Hodge-Melvin loan transaction.

2. The *record* is void of direct testimony or documents showing any economic benefits received by these taxpayers from the $176,312.50 Hodge-Melvin loan transactions.

   a. The Commissioner wrongfully asserted as "income", against Petitioners-Taxpayers, the proceeds of the Hodge-Melvin loan transaction.

   b. The Commissioner wrongfully asserted tax liability against these taxpayers by assessing the proceeds of this Hodge-Melvin loan transaction as "income", none of which the taxpayers received either directly, by construction or in the form of any "economic benefit".

   c. The Comissioner wrongfully assessed these taxpayers for so-called "favors" that were not received from Hodge or anyone else as the new evidence will show.

   d. The Commissioner wrongfully asserted penalties of 50% amounting to more than $100,000.00 in connection with this Hodge-Melvin loan which event is not properly a taxable transaction.

Since the lower courts have been steadfast in their refusal to allow Petitioners to bring in any new evidence

or to hear testimony to fill the *void* in this record and arrive at *truth*, it can be only upon grant of rehearing that the true cause of justice can be served. The Sixteenth Amendment is a grant of power for the taxation of income. Under it that may not be taxed which is *not* "income" nor can the government resort to sharp practice in invoking a technical fiction of "economic" gain *not* "realized". It is basic that such an economic benefit must be a *realized gain* either "actual" or "by construction" before it is lawful to assess and tax. It is the absolute and constant position of these taxpayers, which now can be fully supported by newly discovered evidence and by testimony of third party principals, that these taxpayers *did not* receive in any fashion either directly, constructively, or indirectly, through alleged favors, economic gains, or in any other way, the $176,312.50 determined by the Tax Court to be taxable "income". In point of fact there has never been evidence directly contesting the taxpayers' position and the procedural "presumption of correctness" of the Commissioner's assessment will fall in the face of the new evidence which heretofore has not been evidence of record in this case.

In the instant case—with full recognition that it is not a contention to be advanced frivolously or lightly—taxpayers contend most earnestly that the cause of justice can best be served by this Court's determining, that there has been not only an independent abuse of discretion with respect to the Tax Court's entering of its Order of March 21, 1966 but, with respect to both the trial record and the January 16, 1962 Tax Court opinion as well, earlier abuses of discretion which—with respect to the federal income tax consequences ascribed to a 1956, $176,312.50 bona fide Melvin Building Corporation-Orville E. Hodge business loan—amounts to a wrongful and grievous government taking of taxpayers' property without Due Process of Law.

The trial court judge's Order of March 21, 1966 on its face, is abusive of discretion in its being predicated on ministerial errors as to federal income tax law committed by the Clerk of the Tax Court and adopted as the basis for the Tax Court Order. Even more serious, as a judicial act, this Order constitutes both an *abdication* of the Tax Court's duty to exercise judicial discretion and a disposition not even to consider—in the interests of justice—the opportunity for presentment of the full and "true" facts as to a transaction constituting a basic "question for decision" expressly put in issue by the parties but omitted altogether from direct consideration in the January 16, 1962 opinion and—by reason of a record prompting the trial judge's own admission that he did not "know what the truth is"—constituting an issue never "tried" on its specific relevant facts in the *first instance.*

It is urged that this Honorable Court reconsider the proferred new evidence set out in the Appendix Record. Such documentary material also included, *inter alia,* as part of the newly discovered evidence, neither available nor before the Tax Court at the trial, a detailed financial analysis of Melvin's operational loan policy in effect during the taxable year, including a dollar for dollar bank deposit and withdrawal analysis of the 1956 $176,312.50 Melvin-Hodge business loan transaction. The analysis, prepared by an independent certified public accountant and submitted in affidavit form (See Appendix pp. 24-25) develops conclusively the fact that the $176,312.50 was an advance to Hodge from Melvin Building Corporation as a bona fide business loan. That there were no "favors" of a political nature or so-called "economic Benefits" is evidenced by the new evidence in the affidavit of Mr. Chris Stolfa the Chief Examiner of the Auditor's Office of the State of Illinois during all times here pertinent. (See

Appendix p. 95) The new evidence will further show that the entire proceeds of this $176,312.50 loan were received and used by Orville E. Hodge himself and further that not one cent went to these Petitioners as evidenced by affidavit of Mr. Hodge. (See Appendix p. 46). The real pleadings-joined question in connection with this basic issue was not decided nor tried in the first instance.

CONCLUSION

The extraordinary circumstances of this case, wherein the Tax Court Judge, expressly criticizing the inadequacies of the trial court record, flatly acknowledged in the Tax Court opinion that he did not "know what the truth is"—demonstrates as an actual fact that much evidence was never presented nor available for presentment at the trial because either not yet discovered or known, or not then in existence. Moreover, as taxpayers can demonstrate, certain pertinent evidence which could otherwise have been marshalled and presented at the trial was kept out of the record by reason of the misleading tactics there employed by government counsel. Petitioners further state that they were not negligent in any degree in failing to present such evidence at time of trial and further, that they exercised due diligence in such discovery of new evidence because such evidence includes documents, which as shown upon the face thereof, did not exist until after the Court rendered its decision, and further, Petitioners can now present intervening circumstances, testimony and evidence which, if known to this Court, in the interest of substantial justice would require it to grant relief to the Petitioners.

Further, unless such new evidence as has been discovered since the conclusion of the trial is brought to the Tax Court's attention for judicial analysis on the merits, a grievous wrong will have been worked upon Petitioners-Appellants by reason of both trial and post-trial errors on the part of the Tax Court than can justifiably be viewed by this Court as being both contrary to the interests of justice and amounting, in cumulative effect, to such an abuse of discretion as requires this Honorable Court to exercise its supervisory powers over the courts below, in the protection of the Constitutional rights of these taxpayers in their entitlement to present the new evidence which supplies the full "truth" to the record *now* acknowledged by the lower court to be inadequate. To now tax these Petitioners would in truth and fact be taking property from them in violation of the 14th Amendment to the Constitution, in derogation of Due Process of Law.

For the foregoing reasons these Petitioners respectfully pray that this Honorable Court grant a Rehearing in this matter.

Respectfully submitted,

KINSEY T. JAMES
Attorneys for Petitioners

CERTIFICATE OF COUNSEL

IN THE
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October Term, 1967

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Respondent.

State of Illinois }
County of Cook } ss.

AFFIDAVIT

Kinsey T. James being duly sworn upon his oath states that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay and further certifies that the Petition is restricted to the grounds above specified.

PROOF OF SERVICE

Affiant further states that copies of the Petition have been served upon:

Honorable Ralph S. Spritzer
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
Attorney for Respondent

by First Class Mail
at Chicago, Illinois, charges prepaid, and addressed as above.

And further affiant sayeth not.

/s/ Kinsey T. James

Subscribed and sworn to before me
this 15th day of November, 1967

/s/ G. B. Jarecki
Notary Public